DATO' SERI YUSOF DATO' BIJI SURA A

v.

BTM TIMBER INDUSTRIES SDN BHD & ORS

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COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
ZALEHA ZAHARI JCA
ABDULL HAMID EMBONG JCA
[CIVIL APPEAL NO: W-02-1218-06]
10 JULY 2009

C

CIVIL PROCEDURE: *Committal proceedings - Anton Piller Order - Alleged contemptuous breach - Terms of Order vague and ambiguous - Whether impossible for alleged contemnors to comply - Whether amounted to a fishing expedition - Whether Order could not be enforced by committal*

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The appellant had obtained an *ex parte* Anton Piller Order ('the Order') which *inter alia* and essentially required the respondents, or persons who appear to have control over the specified premises, to: (i) allow the appellant's representatives to enter the business premises of the first respondent; and (ii) allow the documents as listed in Schedule 1 thereof to be searched, inspected, photographed and delivered for the safekeeping of the appellant's solicitors. The appellant alleged that the respondents were in contemptuous breach of the Order when they disallowed his representatives to enter the said premises, and in the circumstances applied for an order of committal against the respondents. The learned judge however took the view that the phrase "persons who appear to have control of the specified premises" as well as the documents listed in Schedule 1 were ambiguous for the purpose of enforcement and contempt proceedings – and further that the Order had the effect of a "fishing expedition" – and in the event dismissed the application. The appellant appealed and the issue that arose was whether on the facts and in the circumstances such decision of the learned judge ought to be affirmed or disturbed by the learned justices of appeal.

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Held (dismissing appeal)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) The learned judge was right in stating that an order will not be enforced by committal if its terms are vague or ambiguous, the rule being analogous to that which governs the interpretation of penal statutes. (para 13)

(2) We are unable to accept the appellant's argument that the persons who dealt with the supervising solicitors when the appellant attempted to enforce the Order, *prima facie*, are the "persons appearing to have control" over the premises within the context of the Order. We are in agreement with the learned judge in ruling that the phrase "appearing to have control of the premises" in the Order was vague. (para 14)

(3) The documents listed in Schedule 1 of the Order sought to be "searched, inspected, photographed and delivered for safekeeping of the appellant's solicitors" were clearly too wide, vague or ambiguous in description as to make it practically impossible for the alleged contemnors to comply. The Order was clearly open to abuse if the search, inspection and seizure of the documents of a competitor is to be allowed. Clause 2.1.4 of the Order further permits the appellant to gain commercially upon sight of the same notwithstanding the objection of the person who was served with the Order. The High Court judge was in the circumstances therefore not in error in ruling that the order obtained was in the nature of a fishing expedition which includes price sensitive information. (para 15)

(4) The High Court judge was right in concluding that the appellant had failed to prove beyond reasonable doubt that the alleged contemnors had committed contempt as alleged. (para 16)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memperoleh satu Perintah Anton Piller *ex parte* ('Perintah') yang antara lain dan secara intinya mengkehendaki responden-responden, atau orang-orang yang kelihatannya mempunyai kawalan terhadap premis berkenaan, supaya: (i) membenarkan wakil-wakil responden untuk memasuki premis

perniagaan responden pertama; dan (ii) membenarkan dokumen-dokumen seperti yang tersenarai di dalam Jadual 1 di situ dicari, diperiksa, diambil gambarnya dan diserahkan kepada peguamcara perayu untuk disimpanjaga. Perayu mendakwa bahawa responden-responden telah melanggar and menghina Perintah apabila enggan membenarkan wakil-wakil responden memasuki premis berkenaan, dan dengan itu telah memohon satu perintah komital terhadap responden-responden. Yang arif hakim bagaimanapun berpandangan bahawa ungkapan "orang-orang yang kelihatannya mempunyai kawalan terhadap premis berkenaan" dan dokumen-dokumen seperti yang tersenarai di dalam Jadual 1 adalah kabur untuk maksud pelaksanaan dan prosiding menghina – dan selanjutnya bahawa Perintah adalah suatu "ekspedisi memancing" – dan dengan demikian telah menolak permohonan. Perayu merayu dan isu yang berbangkit adalah sama ada berdasarkan fakta dan halkeadaan keputusan yang arif hakim di sini patut disahkan ataupun diganggui oleh yang arif hakim-hakim rayuan.

Diputuskan (menolak rayuan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim betul dalam menyatakan bahawa sesuatu perintah itu tidak akan dikuatkuasakan jika terma-termanya tidak jelas atau kabur, di mana ini adalah kaedah yang sama yang dipakai bagi kes pentafsiran statut-statut keseksaan.

(2) Kami tidak dapat menerima hujah perayu bahawa orang-orang yang berurusan dengan peguamcara-peguamcara yang menyelia bilamana perayu hendak menguatkuasakan Perintah, *prima facie*, adalah "orang-orang yang kelihatannya mempunyai kawalan" terhadap premis berkenaan di dalam konteks Perintah. Kami bersetuju dengan yang arif hakim dalam keputusannya bahawa ungkapan "kelihatannya mempunyai kawalan terhadap premis" di dalam Perintah adalah kabur.

(3) Dokumen-dokumen yang tersenarai di dalam Jadual 1 yang hendak "dicari, diperiksa, diambilgambarnya dan diserah untuk disimpanjaga oleh peguamcara perayu" adalah satu deskripsi yang amat luas, samar dan tidak jelas sekaligus menjadikannya mustahil untuk dipatuhi oleh pihak yang didakwa menghina tersebut. Perintah jelas terbuka kepada salahguna jika carian,

pemeriksaan dan perampasan dokumen-dokumen seseorang pesaing dibenarkan. Selain itu fasal 2.1.4 Perintah membenarkan perayu mengambil manfaat komersial dari dokumen-dokumen tersebut walaupun ini dibantah oleh orang yang diserahkan dengan Perintah. Hakim Mahkamah Tinggi dengan itu tidak khilaf dalam memutuskan bahawa perintah yang diperolehi adalah bersifat ekspedisi memancing dan merangkumi maklumat-maklumat mengenai harga.

(4) Hakim Mahkamah Tinggi betul apabila merumuskan bahawa perayu gagal membuktikan di luar keraguan munasabah bahawa orang yang dikatakan menghina itu telah sebenarnya melakukan penghinaan seperti yang didakwa.

Legislation referred to:
Companies Act 1965, s. 181
Rules of the High Court 1980, O. 52 r. 2(2)

Other source(s) referred to:
Arlige, Eady & Smith on Contempt, 2nd edn, para 12-43, p 746

For the appellant - Dato' Bastian P Vendargon (Khaled Abd Jalil & Wong Khen Yen with him); M/s Dennis Nik & Wong
For the respondents - Dato' Mokhtar Ngah; M/s Mokhtar Ngah & Co

[Appeal from High Court, Kuala Lumpur; Petition No: D5-26-8-2006]

[Editor's note: For the High Court judgment, please see Dato' Seri Yusof Dato' Biji Sura lwn. BTM Timber Industries Sdn Bhd & Yang Lain [2007] 7 CLJ 330.]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Zaleha Zahari JCA:

[1] Pursuant to leave obtained on 20 March 2006, the appellant filed notice of motion dated 29 March 2006 (encl. (27)) for an order for committal against four persons: Dato' Seri Yong Tu Sang, Yong Ellen, Chai Owi Yok as well as Yeang Khee Seng (jointly referred to as "the alleged contemnors") for contempt of

court whom the appellant alleged had failed to allow the appellant's representatives to execute an *ex parte* Anton Piller Order dated 16 February 2006 ("the said order").

[2] The High Court Judge Kuala Lumpur on 20 November 2006 dismissed the appellant's application with costs. This appeal was dismissed with costs for the following reasons.

Background

[3] The background facts are these: The petitioner had on 27 January 2006 filed Kuala Lumpur High Court Petition No. D5-26-8-2006 against the BTM Timber Industries Sdn Bhd (BTM Timber, the 1st respondent in the petition) pursuant to s. 181 of the Companies Act 1965 for an order to wind up BTM Timber; alternatively, for an order to compel Dato' Seri Yong Tu Sang, (the 2nd respondent in the petition and named as the 1st alleged contemnor hereinafter referred as "Yong") to buy up his shares in BTM Timber.

[4] This was followed by an *ex parte* summons-in-chambers filed on 3 February 2006 (encl. (5)) by which application the appellant sought an *ex parte* Anton Piller order which was duly granted by the court on 16 February 2006, the non compliance of which is the subject matter of committal proceedings against the persons named for allegedly not complying with the said order when the appellant and his representatives sought to enforce the said order at the 1st and 3rd respondent's registered and business offices on 20 February 2006.

[5] In contempt proceedings such as this, it is necessary to examine critically the precise nature and ambit of the order which the alleged contemnors is alleged to have been in breach of. For convenience of reference the English text of the said order is reproduced. It states as follows:

> ...
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> (2) That the Respondents do allow the Petitioner's representatives (numbering not more than four, including the Petitioner's Solicitors but excluding the supervising solicitor), together with an Advocate and Solicitor of the High Court of Malaya from the firm of Messrs. Khairul Sofian Anuar & Co ("the 1st Supervising Solicitor"), to enter the registered office of the 1st Respondent situated at KM 33, Jalan Kuala Berang, 21800 Ajil, Hulu

A Terengganu, Terengganu Darul Iman ("the 1st Respondent's registered office") and any vehicles in the said premises so that they can search for, inspect, photograph and/or photocopy and deliver into the safekeeping of the Petitioner's Solicitors all the documents (original, duplicate or otherwise) and articles which are
B listed in Schedule 1 of the said Application herein or which the 1st Supervising Solicitor believes to be listed items. The Respondents must allow those persons to remain in the said 1st Respondent's registered office until the search is complete and if necessary to re-enter the said premises on the same or the following day or days in order to complete-the search. This Order
C must be complied with either by the Respondents themselves or by the person appearing to be in control of the said 1st Respondent's registered office. This Order requires the Respondents or their Company Secretary, employees, agents and/ or the persons appearing to be in control of the said registered
D office to permit entry to the said premises immediately upon the Order being served on them, except as stated in paragraph 6(d) below. The Respondents or their Company Secretary, employees, agents and/or the persons appearing to be in control of the said 1st Respondent's registered office must immediately inform the 1st Supervising Solicitor to the best of their knowledge where all the
E listed items in Schedule 1 can be found (whether, within or outside the said registered office) and must immediately hand over to the Petitioner's Solicitors any of the said listed items which are in his possession or under his control;

F (3) That the Respondents do allow the Petitioner's representatives (numbering not more than four, including the Petitioner's Solicitors but excluding the supervising solicitor) together with an Advocate and Solicitor of the High Court of Malaya from the firm of Messrs. Ong Ma & Partners ("the 2nd Supervising Solicitor"), to enter the business premises of the 1st Respondent situated at
G No. 35, Jalan PJU 1/41, Dataran Prima, 47301 Petaling Jaya, Selangor Darul Ehsan ("the 1st Respondent's business premises") and any vehicles in the 1st Respondent's business premises so that they can search for, inspect, photograph and/or photocopy and deliver into the safekeeping of the Petitioner's Solicitors all the documents (original, duplicate or otherwise) and articles which are
H listed in Schedule 1 of the said Application herein or which the 2nd Supervising Solicitor believes to be listed items. The Respondents must allow those persons to remain in the said business premises until the search is complete and if necessary to re-enter the said business premises on the same or the following
I day or days in order to complete the search. This Order must be complied with either by the Respondents themselves or by the

person appearing to be in control of the said business premises. This Order requires the Respondents or their Company Secretary, employees, agents and./or the person appearing to be in control of the said business premises to permit entry to the said business premises immediately upon the Order being served on them, except as stated in paragraph 6(d) below. The Respondents or their Company Secretary, employees, agents and/or the person appearing to be in control of the said business premises must immediately inform the 2nd Supervising Solicitor to the best of their knowledge where all the listed items in Schedule 1 can be found (whether within or outside the said business premises) and must immediately hand over to the Petitioner's Solicitors any of the said listed items which are in their possession or under their control;

(4) That the Respondents do allow the Petitioner's representatives (numbering not more than four, including the Petitioner's Solicitors but excluding the supervising solicitor) together with an Advocate and Solicitor of the High Court of Malaya from the firm of Messrs. Ashvin Kulasingam ("the 3rd Supervising Solicitor"), to enter the registered address of the 3rd Respondent situated at 149A, Jalan Aminuddin Baki, Taman Tun Dr. Ismail, 60000 Kuala Lumpur ("the 3rd Respondent's registered address") and any vehicles in the 3rd Respondent's registered address so that they can search for, inspect, photograph and/or photocopy and deliver into the safekeeping of the Petitioner's Solicitors all the documents (original, duplicate or otherwise) and articles which are listed in Schedule 1 of the said Application herein or which the 3rd Supervising Solicitor believes to be listed items. The Respondents must allow those persons to remain at the 3rd Respondent's registered address until the search is complete and if necessary to re-enter the 3rd Respondent's registered address on the same or the following day or days in order to complete the search. This Order must be complied with either by the Respondents themselves or by the person appearing to be in control of the 3rd Respondent's registered address. This Order requires the 3rd Respondent or their Company Secretary, employees, agents and/or the person appearing to be in control of the 3rd Respondent's registered address to permit entry to the 3rd Respondent's registered address immediately upon the Order being served on them, except as stated in paragraph 6(d) below. The Respondents or their Company Secretary, employees, agents and/or the person appearing to be in control of the 3rd Respondent's registered address must immediately inform the 3rd Supervising Solicitor to the best of their knowledge where all the listed items in Schedule 1 can be found (whether within or outside

A the 3rd Respondent's registered address) and must immediately hand over to the Petitioner's Solicitors any of the said listed items which are in their possession or under their control;

5. That the Respondents do allow the Petitioner's representatives (numbering not more than four, including the Petitioner's Solicitors
B but excluding the supervising solicitor), together with an Advocate and Solicitor of the High Court of Malaya from the firm of Messrs. Khairul Sofian Anuar & Co. ("the 4th Supervising Solicitor"), to enter the business premises of the 3rd Respondent situated at Kawasan Perindustrian Wakaf Tapai, Batu 18, Jalan
C Kuala Berang, 21800 Ajil, Hulu Terengganu, Terengganu Darul Iman ("the 3rd Respondent's. business premises") and any vehicles in the said premises so that they can search for, inspect, photograph and/or photocopy and deliver into the safekeeping of the Petitioner's Solicitors all the documents (original, duplicate or otherwise) and articles which are listed in Schedule 1 of the said
D Application herein or which the 4th Supervising Solicitor believes to be listed items. The Respondents must allow those persons to remain in the said business premises until the search is complete and if necessary to-reenter the said business premises on the same or the following day or days in order to complete the
E search. This Order must be complied with either by the Respondents (themselves or by the person appearing to be in control of the said business premises. This Order requires the Respondents or their Company Secretary, employees, agents and/ or the persons appearing to be in control of the said business premises to permit entry to the said business premises
F immediately upon the Order being served on them, except as stated in paragraph 6(d) below. The Respondents or their Company Secretary, employees, agents and/or the persons appearing to be in control of the said business premises must immediately inform the 4th Supervising Solicitor to the best of
G their knowledge where all the listed items in Schedule 1 can be found (whether within or outside the said business premises) and must immediately hand over to the Petitioner's Solicitors any of the said listed items which are in his possession or under his control;

H (6) That paragraphs (2), (3), (4) and (5) of this Order are each subject to the following:

(a) This Order may only be served between 9.00 am to 5.30 pm on a weekday and between 9.00 am to 1.00 pm on a Saturday. Once served, this Order may be executed
I any time between 9.00 am to 8.30 pm on a weekday and between 9.00 am to 4.00 pm on a Saturday;

(b) Paragraphs (2), (3), (4) and (5) of this Order must be carried out in the presence of the respective Supervising Solicitor and under his supervision;

(c) Once this Order has been served, no items may be removed from the said registered office and/or the said business premises ("the said premises") until a list of the items to be removed has been prepared by the Supervising Solicitor and a copy of the list has been supplied to the person served with the Order;

(d) Before permitting entry to the said premises, the Supervising Solicitor shall offer to explain to the person served with the Order its meaning and effect in everyday language and the Respondents or other person appearing to be in control of the said premises may seek legal advice, provided he does so at once. Whilst this is being done, he may refuse entry to the said premises for a short time (not to exceed 2 hours);

(e) If there are present or found within the said premises searched computers, whether portable computers or otherwise, the Respondents, the Company Secretary, their employees, their agents and/or any person appearing to be in control of the said premises must immediately give the Petitioner's Solicitors and the respective Supervising Solicitors effective access to the information in the computers with all necessary passwords, to enable them to be searched and if information relating to any of the listed items are found, the said computers containing the said information must be delivered to the Petitioner's Solicitors for safekeeping as evidence. If the Respondents, the Company Secretary, their employees, agents and/or any person appearing to be in control of the said premises fail, neglect or refuse to cooperate in giving effective access as aforesaid, the Petitioner's Solicitors and/or the Supervising Solicitors shall be entitled to remove the computers for retrieval of the information therein and thence for safekeeping thereof by the Petitioner's Solicitors;

(f) The Respondents, the Company Secretary, their employees, agents and/or any person appearing to be in control of the said premises shall, if required by the Petitioner's Solicitors or the Supervising Solicitors, allow access to all areas within the said premises and shall unlock or open or cause to be unlocked or opened any doors,

A cabinets, cupboards or entrances leading to any area which is locked or closed and to unlock and open all vehicles within the relevant premises which are locked or closed.

(g) Except for the purpose of obtaining legal advice, each of the Respondents must not directly or indirectly whether B by themselves, the Company Secretary, their servants or agents or otherwise inform anyone of these proceedings or of the contents of this Order, or warn anyone that proceedings have been brought against him by the Petitioner until the final disposal of the action herein; and

C (h) The words where appropriate importing the "singular" may be read as "plural" and *vice versa.*

(7) The 2nd Respondent and/or the Company Secretary of the 1st and 3rd Respondents, their servants or agents or otherwise, shall D forthwith deliver up or cause to be delivered up to the Petitioner's Solicitors any of the documents (original, duplicate or otherwise) and articles stated in Schedule 1 herein which are in their possession or under their control whether by themselves or by the said Company Secretary, their servants or agents or otherwise, and the Petitioner's Solicitors shall retain such documents and E articles until the final disposal of the action herein upon the Petitioner's undertaking to abide by any Order the Court or Judge may make as to damages in case the Court or Judge should hereafter be of the opinion that any of the Respondents shall have sustained any loss or damage by reason of this Order which the F Petitioner ought to pay;

(8) The proceedings in prayers (2), (3), (4) and (5) above may, as far as possible, be recorded with a video camera or video cameras;

G (9) That the Petitioner shall be at liberty to use any information, documents or material obtained as a result of carrying out the Order for the purpose of these proceedings, and with leave of this Honourable Court in any other proceedings against, by or any of the Respondents other than this action;

H (10) That the Respondents shall bear the costs of this application which shall be taxed and to be paid forthwith;

I

Schedule 1

(Listed items)

1st and 3rd Respondents

(a) Company's secretarial files;

(b) General Ledgers;

(c) Subsidiary ledgers;

(d) Payment vouchers and the supporting documents;

(e) Sales invoices;

(f) Sales journal;

(g) Journal vouchers;

(h) Bank statements and reconciliation;

(i) Cheque butts;

(j) Balance sheets and Profit and Loss Accounts;

(k) Audit and taxation working papers;

(1) Letters and correspondences;

(m) Facsimile and electronic mail messages;

(n) Minutes of meetings; and

(o) Any other relevant documents pertaining to this action.

[6] Supervising solicitors were also appointed by the court pursuant to the said order, and they each had prepared their respective report as to what transpired when the appellant and his representatives sought to enforce the said order on 20 February 2006 (exhs. "DSY4", "DSY6" and "DSY8" annexed to the affidavit of Dato' Seri Yusof bin Dato' Biji Sura @ Mohamad affirmed on 9 March 2006).

[7] In the statement filed pursuant to O. 52 r. 2(2) of the Rules of the High Court 1980 ("the Rules") the acts of contempt alleged to have been committed are as contained in paras 4 to 23 of the statement. The petitioner's complaint was this. When the appellant and his representatives went to BTM Timber's registered address to enforce the said order on 20 February 2006, the order

was served on Ms Chai Owi Yok, the Executive Secretary and the Administration and Finance Manager of BTM Timber, and after consultation with solicitors, the appellant's representatives were not allowed to enforce the order. Likewise when the appellant and his representatives sought to enforce the said order at BTM Timber's business premises and at Gimzan Plywood Sdn Bhd (the 3rd respondent named in the petition, subsequently referred to as "Gimzan") business premises on the same date (20 February 2006).

[8] A clerk (Miss Teng) accepted service of the said order and one "Yong Ellen" appeared to be in control over BTM Timber's business premises. After an exchange of telephone conversation between the appellant's solicitors and Yong's solicitors, the appellant's representatives were not allowed to enforce the said order at the BTM's business premises.

[9] At Gimzan's business premises, Yeang Khee Seng, (Gimzan's General Manager), upon being advised by their solicitors, did not accept service of the order, and the appellant's representatives were also not allowed to enforce the said order at Gimzan's business premises.

The High Court Judge's Decision

[10] The judge was of the view upon examination of the 14 paged order that the terms of the said order were ambiguous and impossible to be complied with. He was of the view that the term, "persons who appear to have control over the specified premises" as contained in the order was ambiguous for the purpose of enforcement, and for the purpose of contempt proceedings.

[11] He was also of the opinion that the documents listed in Schedule 1 annexed to the said order sought to be "searched, inspected, photographed and delivered for safekeeping of the petitioner's solicitors" were too wide, vague and ambiguous as to make it practically impossible to comply. As to the documents described as, "sale invoices, sales journal", these were price sensitive information. He was of the opinion that the effect of the order was that of a "fishing expedition". The documents listed in Schedule 1 was then ruled to be too general and ambiguous for the purposes of committal.

[12] He then concluded that there was no contemptuous breach of the said order. As the appellant had failed to prove beyond reasonable doubt that the alleged contemnors had committed the alleged acts of contempt, the appellant's application was then dismissed with costs.

Decision

[13] The learned judge was clearly right in stating that an order will not be enforced by committal if its terms are vague or ambiguous, the rule being analogous to that which governs the interpretation of penal statutes. It is to the terms of the order itself that one must look in order to define the obligations imposed. See Arlige, Eady & Smith on *Contempt* (2nd edn) para 12-43 p. 746:

> An order or undertaking will not be enforced by committal if its terms are ambiguous, the rule being analogous to that which governs the interpretation of penal statute. It is to the terms of the order itself that one must look in order to define the obligations imposed.

[14] We are unable to accept the appellant's argument, that the persons who dealt with the supervising solicitors when the appellant attempted to enforce the said order, *prima facie*, are the "persons appearing to have control" over the premises within the context of the said order. We are in agreement with the learned judge in ruling that the phrase "appearing to have control of the premises" in the said order was vague.

[15] As to the documents listed in Schedule 1 of the said order sought to be "searched, inspected, photographed and delivered for safekeeping of the appellant's solicitors", the items listed were clearly too wide, vague and/or ambiguous in description as to make it practically impossible for the alleged contemnors to comply. The said order clearly was open to abuse if the search, inspection and seizure of the documents of a competitor is to be allowed. Clause 2.1.4 of the said order permits the appellant to gain commercially upon sight of the same notwithstanding the objection of the person who was served with the order. The High Court Judge was in the circumstances therefore not in error in ruling that the said order obtained was in the nature of a fishing expedition which includes price sensitive information.

[16] The High Court Judge was right in concluding that the appellant had failed to prove beyond reasonable doubt that the alleged contemnors had committed contempt as alleged.

[17] The appeal was accordingly dismissed with costs. The deposit to the respondents to account of taxed costs.

[18] My brothers, Justice Tengku Baharudin Shah and Justice Abdull Hamid, have seen this judgment in draft and have expressed their agreement with it.